IN THE

Supreme Court of the United States

October Term, 1978

No. 78-1909

PHILIP CARCHMAN and MARILYN R. CARCHMAN,
Petitioners,

v.

THE KORMAN CORPORATION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

RESPONDENT'S BRIEF IN OPPOSITION.

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RESPONDENT'S BRIEF IN OPPOSITION.

Respondent, The Korman Corporation, respectfully requests that this Court deny the petition for writ of certiorari seeking review of the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in this proceeding on March 13, 1979.

OPINIONS BELOW.

The opinion of the Court of Appeals (Pet. App. A, p. 11) is reported at 594 F. 2d 354. The opinion of the District Court (Pet. App. A, p. 15) is reported at 456 F. Supp. 730.

JURISDICTION.

The judgment of the Court of Appeals for the Third Circuit was entered on March 13, 1979. By an order dated June 7, 1979, Justice Brennan granted petitioners' application for an extension of time until June 29, 1979, in which to file a petition for a writ of certiorari. The petition was filed on June 25, 1979. This Court's jurisdiction is invoked under 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED.

1. Whether alleged animus against tenant organizers constitutes "invidiously discriminatory class-based animus" for the purpose of 42 U. S. C. § 1985(3), so as to convert an ordinary landlord-tenant dispute into a civil rights violation.

2. Whether 42 U. S .C. § 1985(3) in and of itself protects against private infringement First Amendment rights which are otherwise protected only against government interference.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED.

Amendment I to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

42 U. S .C. § 1985(3), R. S. § 1980, provides:

> If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

STATEMENT OF THE CASE.

Some statement of the history of the case is required because petitioners have felt free to make assertions which were presented neither to the Court of Appeals nor to the

District Court and which are indeed affirmatively contradicted by the record.

The original complaint (Appendix I) was based entirely on the First Amendment and charged Korman with a conspiracy directed against Philip Carchman.

After a motion to dismiss, the Carchmans added by amendment (Appendix II) a second count alleging a violation of 42 U. S. C. § 1985(3), but still not alleging any class-based animus as required by *Griffin v. Breckenridge*, 403 U. S. 88 (1971). Korman again filed a motion to dismiss.

During a subsequent status conference District Judge Edward R. Becker agreed that the absence of an allegation of class-based animus would require dismissal. During the course of the conference, however, the District Court permitted counsel for the Carchmans further to amend the complaint to allege "that the actions of defendant complained of were motivated by invidiously discriminatory class-based animus against a class of tenant organizers" (Appendix III).

Thereafter, the District Court granted Korman's motion to dismiss the amended complaint on the grounds that Count I failed to state a cause of action under the First Amendment because no state action was alleged and Count II failed to state a cause of action under 42 U. S. C. § 1985 (3) because it did not allege a cognizable class-based animus.

On appeal to the Third Circuit, the Carchmans challenged only the dismissal of their § 1985(3) claim, which the Court of Appeals affirmed on the ground that tenant organizers do not constitute a class protected by the statute. The Carchmans' petition for writ of certiorari followed.

REASONS FOR DENYING THE WRIT.

I. Petitioners Have Reduced Their Case to an Attempt to Seek an Additional Amendment to the Pleadings.

The petition (page 8) expressly acknowledges that:

> The Court of Appeals was justified in holding a class of tenant organizers does not qualify under the *Griffin v. Breckenridge, supra*, interpretation of a proper section 1985(3) class.

What petitioners now contend is that the decision should have addressed itself to the class of the tenants' association, asserting:

> The tenant's association to which the Carchmans belonged had a formal organizational structure, it was organized as a non-profit corporation under the laws of the Commonwealth of Pennsylvania, and had an easily recognized membership.
>
> It is *this* class which the Carchmans contend is a proper class for protection under section 1985(3).

Petition at 8.

But the Court of Appeals addressed itself to the class ("tenant organizers") which the Carchmans alleged in their third and final pleading, and which they now concede to be insufficient. In effect, the petition asks this Court to permit a fourth pleading, to avoid the decision of the Court of Appeals.

We do not for a moment acknowledge that a tenants' association is an adequate class within the rule of *Griffin v. Breckenridge, supra*. But whether such an association is a cognizable class for that purpose is an issue which is not presented by this record.

II. There Is No Conflict Among the Circuits Over Whether Tenant Organizers or Members of a Tenants' Association Constitute a § 1985(3) Class.

Petitioners do not seek to resolve a genuine difficulty in the interpretation of *Griffin v. Breckenridge;* they seek to have the case reconsidered.

The petition makes much of the District Court's discussion of two lines of cases dealing with the nature of the class required by *Griffin v. Breckenridge, supra.* But whether or not all these cases can be fully reconciled, in holding or in rationale, the present action is not an appropriate vehicle for analysis of the issues raised by these decisions. It stands wholly apart from the spectrum reflected in the decisions cited. The hard fact is that the Carchmans claim to have been denied renewal of a lease because of activities regarded as inimical by the landlord. To say that they can utilize § 1985(3) by making reference to a class of organizers, a class of members of a tenants' association, or the like, would be to overrule *Griffin v. Breckenridge, supra,* or to turn it into nothing more than a test for the semantic resourcefulness of counsel.

There is clearly no conflict among the lower federal courts over the precise issue which the granting of the Carchmans' petition would present to this Court. The Carchmans have not cited, and Korman has not been able to locate, any decision other than those below dealing with the issue of whether tenant organizers, or members of a tenants' association, constitute a cognizable class under 42 U. S. C. § 1985(3).

Nor do the decisions of those federal courts which have considered whether various groups constitute § 1985(3) classes present the type of "conflict in principle" which the Carchmans have attempted to portray in order to obtain this Court's review of the decision below. On

the contrary, there exists among those federal courts which have considered the issue a marked uniformity of opinion as to the criteria for a § 1985(3) class.

On the one hand, the courts have apparently construed the "racial, or perhaps otherwise class-based invidiously discriminatory animus" language in *Griffin* as requiring, if not racial discrimination, discrimination on the basis of a trait bearing at least some of the attributes of race. Thus, because sex, like race, is a congenital and unalterable trait, sexual discrimination has been held to be within the purview of § 1985(3). *Novotny v. Great American Federal Savings & Loan Association,* 584 F. 2d 1235, 1243 (3d Cir. 1978) (*en banc*), *rev'd on other grounds,* 47 U. S. L. W. 4681 (U. S. June 11, 1979); *Conroy v. Conroy,* 575 F. 2d 175 (8th Cir. 1978). Similarly, because membership in a religious minority, like membership in a racial minority, has historically resulted in oppression by the majority, religious discrimination has also been found to be encompassed by the statute. *Marlowe v. Fisher Body,* 489 F. 2d 1057 (6th Cir. 1973); *Baer v. Baer,* 450 F. Supp. 481, 491 (N. D. Cal. 1978).

The courts also have consistently recognized discrimination on the basis of political loyalty (*i.e.,* support of a particular political candidate) as within the ambit of § 1985(3). *Means v. Wilson,* 522 F. 2d 833 (8th Cir. 1975), *cert. denied,* 424 U. S. 958 (1976); *Cameron v. Brock,* 473 F. 2d 608 (6th Cir. 1973). While political loyalty may not share with race the characteristics of immutability or historical oppression, the courts have apparently been satisfied with the fact that the inherent connection between the exercise of civil rights and the support of a political candidate renders it highly unlikely that wrongful action directed against supporters of a political candidate would be merely tortious, which is the evil

against which *Griffin*'s requirement of class-based animus was designed to protect. 403 U. S. at 102. Thus, the holding in *Means v. Wilson, supra*—that Indian supporters of a political candidate for tribal election and members of the American Indian Movement constitute a § 1985(3) class—is considerably narrower than the "intellectual nexus" test approved therein and on which the Carchmans place primary reliance.

On the other hand, the courts have refused to extend § 1985(3) protection to any mere aggregation of individuals. *Phillips v. International Association of Bridge, Structural and Ornamental Iron Workers, Local 118*, 556 F. 2d 939 (9th Cir. 1977) (dissenting union members not a cognizable class); *Morgan v. Odem*, 552 F. 2d 147 (5th Cir. 1977) (class of "newcomers" to a particular parish not cognizable under § 1985(3)); *McLellan v. Mississippi Power & Light Company*, 545 F. 2d 919 (5th Cir. 1977) (*en banc*) (class of those discharged from employment because of their filing petitions in bankruptcy not cognizable under § 1985(3)); *Ohio Inns, Inc. v. Nye*, 542 F. 2d 673 (6th Cir. 1976), *cert. denied*, 430 U. S. 946 (discrimination against non-union employers not class-based animus under *Griffin*). *See also* cases cited by the Carchmans at p. 7 of their petition. The Court of Appeals for the Seventh Circuit explained the rationale of the above decisions in rejecting (on other grounds) a § 1985(3) claim by non-union hospital employees:

> The class is small and its constituency dependent on circumstances subject to ready change. Its character is quite different from classes based on race, ethnic origin, sex, religion and political loyalty. Although we do not reach the question, we doubt whether it fulfills the *Griffin* requirement.

Murphy v. Mount Carmel High School, 543 F. 2d 1189, 1192, n. 1 (7th Cir. 1976).

The decision of the court below thus presents no conflict, even "in principle", with pre-existing § 1985(3) case law,[1] since it fits squarely within the second category of cases, in which the courts have consistently refused to extend § 1985(3) protection to any mere aggregation of individuals, even though some of those groups were obviously exercising First Amendment rights as well (*see, e.g., Phillips, supra* (dissenting union members not a § 1985(3) class)).

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1. Nor do any of the other cases cited in the petition present any real conflict among the Circuits. By recognizing a § 1985(3) cause of action against defendants "stimulated . . . by racial and economic motives" in *Action v. Gannon*, 450 F. 2d 1227, 1232 (8th Cir. 1971), the Eighth Circuit merely applied the statute to the very core of its intended coverage.

Although a single white middle class family did maintain a § 1985(3) action in *Azar v. Conley*, 456 F. 2d 1382 (6th Cir. 1972), the only issue before the court in that case was the necessity for specific intent. Thus, the Sixth Circuit in *Azar* expressly noted that the issue of whether the protection of § 1985(3) extended to a white middle class family had not been raised in the trial court and therefore would not be decided on the appeal. 456 F. 2d at 1386-87, n. 5.

Similarly, since in *Bellamy v. Mason's Stores, Inc. (Richmond)*, 508 F. 2d 504 (4th Cir. 1974), the Fourth Circuit affirmed the dismissal of a § 1985(3) complaint on the ground that § 1985(3) does not provide a cause of action for private interference with the right of association, it never reached the issue of whether discrimination on the basis of political association is "class-based" discrimination within the meaning of § 1985(3).

In rejecting a § 1985(3) claim on behalf of bankrupts in *McLellan v. Mississippi Power & Light Co.*, 545 F. 2d 919 (5th Cir. 1977) (*en banc*), the Fifth Circuit went so far as to reserve expressly the issue "whether Congress intended that *only* racial bias would activate § 1985(3)". 545 F. 2d at 929. As recognized by the petitioners, that court's previous decision and opinion in *Westberry v. Gilman*, 507 F. 2d 206 (5th Cir. 1975), which had held that environmentalists were a class protected by § 1985(3), has been vacated and withdrawn as moot so as to "spawn no legal precedents". 507 F. 2d at 216.

Only if the Carchmans had alleged discrimination on the basis of their race, religion, sex or political loyalty would the dismissal of their amended complaint have created such a conflict. On the contrary, since the decision below is in accord with the criteria which the lower courts have developed for determining whether a § 1985(3) class exists, there is no need for review of it by this Court.

III. The Decision of the Court of Appeals for the Third Circuit Was Correct.

Not only is the decision below consistent with the decisions of the other lower federal courts, it is also correct, and there is, therefore, no need for review by this Court.

The purpose of this Court's requirement in *Griffin v. Breckenridge, supra,* of "some racial, or perhaps otherwise class-based invidiously discriminatory animus" was to prevent 42 U. S. C. § 1985(3) from becoming a general federal tort law. 403 U. S. at 102. That purpose can only be served, however, by a *limiting* definition of "class", rather than the all-inclusive definition that would be required to bring a group of tenant organizers within the protection of the statute.

As even the Carchmans recognize (petition at 8), if a group of tenant organizers were within the ambit of 42 U. S. C. § 1985(3), there would be no limit upon the numbers or types of groups cognizable under that statute. A member of any aggregation of two or more individuals —"pedestrians who walk on a certain street, . . . motorists who drive on a particular road, or . . . people who wear blue shirts . . ." (*Kimble v. D. J. McDuffy, Inc.*, 445 F. Supp. 269, 275 (E. D. La. 1978))—could then successfully maintain an action under § 1985(3). That such would be the ultimate result is vividly illustrated by the

facts of the present case—in which an ordinary landlord-tenant dispute would purport to become the subject of a federal action.

Nor is petitioners' characterization of their group as a tenants' association exercising First Amendment freedoms any more limiting. Indeed, because the First Amendment freedom of association inheres in all types of aggregations of individuals, a definition of a § 1985(3) "class" based on the exercise of First Amendment rights would amount to no limitation at all. A member of any group would qualify under an "associational" definition of class-based animus, because any conspiracy aimed at him or her as a member of any such group would be interfering with that member's right to associate with the group. Thus, because defining a class by its exercise of First Amendment rights would no more serve the limiting function required by this Court in *Griffin v. Breckenridge* than a definition which includes tenant organizers *per se,* the Court of Appeals acted properly in dismissing the Carchmans' complaint, regardless of whether it considered the alleged class to be a group of tenant organizers or a tenants' association.

IV. Petitioners Have Not Alleged Deprivation of a Federal Right Protected From Infringement by 42 U. S. C. § 1985(3).

There is a clear alternate ground for affirmance of the decision which is independent of the issue to which the petition addresses itself.

The Carchmans have never challenged the District Court's holding that the amended complaint fails to state a cause of action directly under the First Amendment because it does not allege state action on the part of Korman or any of its alleged co-conspirators (Pet. App. A at 16,

456 F. Supp. at 732). *Hudgens v. N. L. R. B.*, 424 U. S. 507, 513 (1976); *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U. S. 94, 114 (1973); *Public Utilities Commission v. Pollak*, 343 U. S. 451, 461 (1952). Nor is there any other basis extrinsic to 42 U. S. C. § 1985(3) for claiming a "free speech" right *against Korman*. It is, apparently, the Carchmans' position that 42 U. S. C. § 1985(3) in and of itself creates a right to be free from other private individuals' complaining about what one says or with whom one associates.

42 U. S. C. § 1985(3), however, only protects rights conferred by federal sources independent of the statute itself. As this Court stated in *Great American Federal Savings & Loan Association v. Novotny*, 47 U. S. L. W. 4681 (U. S. June 11, 1979), decided after the decision below:

> Section 1985(c) . . . *creates* no rights. It is a purely remedial statute, providing a civil cause of action when some otherwise defined federal right—to equal protection of the laws or equal privileges and immunities under the laws—is breached by a conspiracy in the manner defined by this section.

47 U. S. L. W. at 4684.

CONCLUSION.

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Dated: September 13, 1979

APPENDIX I.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 77-2477

PHILIP CARCHMAN and MARILYN R. CARCHMAN, his wife.

v.

THE KORMAN CORPORATION

Complaint.

1. The action arises under the First Amendment to the Constitution of the United States, as hereinafter more fully appears. The matter in controversy exceeds, exclusive of interest and costs, the sum of TEN THOUSAND ($10,000.00) DOLLARS.

2. Plaintiffs are PHILIP and MARILYN R. CARCHMAN, man and wife, residing at 1071 Frederick Road, Meadowbrook, Montgomery County, Pennsylvania.

3. Defendant is THE KORMAN CORPORATION, a Pennsylvania corporation with its principal place of business located at 101 Greenwood Avenue, Jenkintown, Pennsylvania.

4. Plaintiff PHILIP CARCHMAN was an officer in the Meadowbrook Apartments Tenants Association, Inc., living

in Meadowbrook Apartments, Huntingdon Pike, Huntingdon Valley, Montgomery County, Pennsylvania. Defendant KORMAN CORPORATION was and is the managing agent of Meadowbrook Apartments.

5. Plaintiff PHILIP CARCHMAN was, in his position as an officer of the Tenants Association, an active advocate of tenant's rights at the Meadowbrook Apartments. While such an advocate, Plaintiff, PHILIP CARCHMAN was involved in a 1974 criminal suit in Pennsylvania State Court against Defendant KORMAN CORPORATION.

6. As a result of Plaintiff PHILIP CARCHMAN's active role in the tenants association, he was labeled as undesireable by Defendant KORMAN CORPORATION and forced to vacate his apartment at Meadowbrook Apartments on or about September 30, 1975.

7. Plaintiffs PHILIP CARCHMAN and MARILYN R. CARCHMAN had, up to and including September 30, 1975, complied with all the covenants and provisions of their lease with Defendant KORMAN CORPORATION.

8. Defendant KORMAN CORPORATION's sole reason for denying Plaintiffs renewal of their lease was Plaintiff PHILIP CARCHMAN's active role in the Meadowbrook Tenants Association and Defendant's action was designed to stifle and discourage Plaintiffs exercise of his freedoms of speech and association as guaranteed by the First Amendment of the Constitution of the United States.

9. As a result of Defendant's conduct, Plaintiffs were forced from their home and forced to seek living accomodations elsewhere, causing Plaintiffs considerable expense in moving to a new home.

10. Plaintiff MARILYN R. CARCHMAN was required to undergo expensive medical treatment as a result of the

trauma and anxiety caused by Defendant's course of conduct.

WHEREFORE, Plaintiffs demand judgment against Defendant for compensatory and punitive damages in an amount in excess of TEN THOUSAND ($10,000.00) DOLLARS, plus interest and costs of this suit.

/s/ PAUL W. TRESSLER
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APPENDIX II.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 77-2477

PHILIP CARCHMAN and MARILYN R. CARCHMAN, h/w

v.

THE KORMAN CORPORATION

Motion to Amend Plaintiff's Complaint as a Matter of Course Under F. R. Civ. P. 15(a).

Plaintiffs PHILIP CARCHMAN and MARILYN R. CARCHMAN, by their attorney, Paul W. Tressler, Esquire, request leave of court pursuant to Rule 15(a) of the Federal Rules of Civil Procedure to file the following amendment to their Complaint as a matter of course, heretofore filed in the above entitled and numbered cause. Such proposed amendment is as follows:

COUNT II

11. Plaintiffs reallege the allegations contained in paragraphs 1 to 10 of their Complaint as fully as if they were stated at length herein.

12. This claim arises under Title 42 of the United States Code, Section 1985, and this court has jurisdiction under Title 28 of the United States Code, Section 1343.

13. Between May of 1973 and September 30, 1975, defendant KORMAN CORPORATION along with their agents, WILLIAM C. LISS, General Manager of Meadowbrook Apartments, and STEVEN A. ARBITTIER, ESQUIRE, and J. E. DRATCH, M. B. DRATCH, M. DRATCH, H. A. & L. HONICKMAN, B. E. KORMAN, L. I. KORMAN, S. H. KORMAN, S. J. KORMAN, J. M. LANSFIELD, I. B. Moss, S. R. Moss, E. TAXIN, M. A. TAXIN GRABOV and R. N. TAXIN, trading as the MEADOWBROOK VALLEY PARTNERSHIP with a business address at 101 Greenwood Avenue, Jenkintown, Pennsylvania 19046, maliciously and with intent to injure Plaintiffs, conspired together to deprive Plaintiffs of having and exercising the rights and privileges of citizens of the United States, namely their rights of speech and association as guaranteed by the First and Fourteenth Amendments to the Constitution of the United States.

14. The individuals named as trading as the MEADOWBROOK VALLEY PARTNERSHIP are the owners of the Meadowbrook Apartments.

15. In furtherance of the conspiracy, KORMAN CORPORATION, through its agent WILLIAM C. LISS, refused to renew Plaintiff's lease at Meadowbrook requiring Plaintiffs to vacate their apartment by September 30, 1975.

16. The action by KORMAN, its agents, and the MEADOWBROOK VALLEY PARTNERSHIP, were in retaliation for Plaintiff's active participation in the Meadowbrook Tenant's Association and were also to prevent Plaintiff's further exercise of their rights of speech and association with respect to the tenant's association.

17. Plaintiff's had, up to and including September 30, 1975, complied with all the requirements and covenants of their lease at Meadowbrook.

18. Defendant KORMAN's sole motivation for the refusal to renew Plaintiff's lease was to deprive Plaintiff's exercise of their rights of speech and association.

19. As a result of the wrongful acts of KORMAN, its agents, and the MEADOWBROOK VALLEY PARTNERSHIP in terminating Plaintiff's lease for the reasons mentioned above, Plaintiffs were forced to undergo the expense of finding and moving to a new home, Plaintiff Marilyn R. Carchman was required to undergo medical treatment for the trauma caused by the acts described above, and were otherwise damaged by their dislocation.

WHEREFORE, Plaintiffs demand judgment against defendant in the amount of Fifty Thousand Dollars ($50,000.00) compensatory damages and Two Hundred and Fifty Thousand Dollars ($250,000.00) punitive damages.

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APPENDIX III.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 77-2477

PHILIP CARCHMAN and MARILYN R. CARCHMAN, h/w

v.

THE KORMAN CORPORATION

Order.

AND Now, this 19th day of May, 1978, after hearing and by agreement of counsel, it is hereby ORDERED that plaintiff's complaint be deemed further amended to allege that the actions of defendant complained of were motivated by invidiously discriminatory class-based animus against a class of tenant organizers. Defendant's motion to dismiss shall be treated as applicable to the complaint as hereby amended.

BY THE COURT:

/s/ EDWARD R. BECKER
Edward R. Becker, *J.*